

## **MINUTES**

### **Ad Hoc Committee on Probate Law and Procedure**

Administrative Office of the Courts

450 South State Street

Salt Lake City, Utah 84114-0241

April 18, 2008 - 12:00p.m.

#### **ATTENDEES**

Kent Alderman

Kerry Chlarson

Mary Jane Ciccarello

Judge George Harmond

Justice Richard Howe

Steve Mikita

Marianne O'Brien

Kathy Thyfault

#### **EXCUSED**

Judge Reese Hanson

Maureen Henry

Julie Rigby

Judge Gary Stott

#### **GUESTS**

Kathy Elton

#### **STAFF**

Diana Pollock

Tim Shea

### **I. WELCOME AND APPROVAL OF MINUTES**

Judge Harmond welcomed the committee members to the meeting. There was a motion to accept the minutes of the March, 2008 committee meeting. The motion was seconded. The motion carried unanimously.

### **II. EVALUATION REPORT FORMS**

Tim Shea prepared a draft of two forms with the information given by Gloria Jensen-Sutton and the medical practitioners. Mr. Shea's draft is based on the ABA's clinical evaluation form with an addition of a motion and order. The committee discussed the evaluation forms. Some of the committee's points:

- The statute gives the court the authority to appoint a physician. The forms need not rely on Rule of Civil Procedure 35. A motion to complete the examination and report might not be necessary. The judge can order an exam without a motion.
- The clinical report is not to take the place of the special visitor.
- The purpose of the report form is to provide the judge with enough evidence to make a factual determination about incapacity. The form should not restrict the exam. The form should not complicate what might be a simple exam.
- Should the petitioner generate this type of evidence before the petition is filed or should a petition be filed and the judge orders the exam?

- Medical practitioners feel it would be beneficial if there is a court order because of doctor-patient privilege.
- With a sound process and sound standards, decision-making should be left to the judgment of the players.
- The form might be more efficient if it was broken into areas of concern or a summary form.
- The form might not be used in some cases. Just parts of the inquiry might be needed in others. And a global assessment might need to be done for some.
- The form organizes the report of the physician or the evaluator, rather than telling the judge what to do. The form is meant to report observations and opinions.
- Is the focus on the physician or is it on the putative ward?
- The form would help protect the ward because physicians don't always look at the ward's mental capacity.
- Should the word "motion" or "petition" be used? The Probate Code provides that it is a "petition" because it hasn't been put at issue. Once the matter is put at issue, the rules of civil procedure apply. Perhaps "request" is best.
- The committee's report should recognize that the form is not expected in every case and is intended for guidance.
- The form anticipates some level of cooperation of the ward.
- The language "should the person attend this meeting?" should be changed to "would attending this hearing cause the person undue distress?"

Tim Shea will redraft the evaluation forms to include the committee's proposed changes.

### **III. AUTHORITY AND DUTIES OF GUARDIAN**

Tim Shea made the changes that the committee asked for. There were a few brief edits.

- Use the phrase "self neglect" rather than "self abuse." "Self injurious behavior" would cover both abuse and neglect.
- Appears to be no confusion that the guardian may admit the ward but not commit the ward. To commit the ward, the guardian must petition for involuntary commitment.
- Specify that the protective order a guardian may seek is a protective order under the Probate Code.
- Develop a section that identifies all of the post-appointment issues.
- The guardian should be able to act in behalf of the ward for routine medical attention without going to the court for approval.
- Inventory would have to be filed by the guardian if there isn't a conservator. Parents serving as guardians or conservators should file an annual report.

Tim Shea developed a statute outlining the contents for a guardianship plan. This statute would identify what the minimum requirements would be.

- A guardianship plan ensures the guardian has given some thought to the ward's future life.
- The statute balances the ward's rights and the ease of appointing a guardian.
- A statute requiring a guardianship plan is needed.
- Best interest decision-making and substitute judgment decision-making are used here and defined in a separate section of the code.

#### **IV. ROLE OF MEDIATION**

Kathy Elton, the Mediation Director, was introduced to the committee. Ms. Elton stated that the ADR Committee feels that this is an area in which mediation could be utilized. Ms. Elton explained the mediation program to the committee.

- A pilot program was conducted in Ohio, Florida, Wisconsin and Oklahoma. The pilot program found that when mediation was used in contested guardianship cases, approximately 75% of the cases were resolved.
- National reports show that the mediation success rate is between 75% and 80%.
- The mediation program in Utah is not well integrated or coordinated within the judiciary. This is an improvement that could be made in the courts.
- The greatest barrier to success of mediation in guardianship cases is a lack of education and understanding by judges and attorneys.
- Under certain circumstances, such as in domestic abuse cases, people can opt out of mediation at their discretion.

The committee agreed to recommend mediation in contested guardianship cases, provided there is not good cause to opt out.

#### **V. MONITORING PROGRAM**

Tim Shea proposed developing a program in which a paid staff person would recruit, train and support community volunteers to review annual reports. It would be similar to the court's very successful CASA program. The ABA and AARP have recently published a report on this approach, summarizing the features that make them successful. Dan Becker will recommend that the Judicial Council set aside some money to hire a volunteer coordinator. If initially successful, the program might grow to include visiting the ward on a regular basis and serve as court-appointed visitors before a guardian is appointed. The committee recommended that Mr. Shea go forward with the monitoring program.

#### **VI. ADJOURN**

The committee meeting adjourned at 2:15 p.m.